GOH LIEW KEE @ GOH AH NYA

v.

C. MOOSA B. HAJI ABDULLAH

HIGH COURT, PENANG
DATUK EDGAR JOSEPH JR. SCJ.
[ORIGINATING SUMMONS
NO: 31-471-87]
23 APRIL 1992

PROBATE AND ADMINISTRATION: Deceased died intestate - Applicant claiming retransfer of disputed property on ground that she is the lawful widow and sole next of kin - Respondent denying applicant's claim - Questions of fact - Application adjourned to open Court to resolve status of applicant - Requirements of the common law applicable - Marriage per verba praesento.

The applicant applied for an order that the respondent transfer certain land, which formed part of the estate of one K. Sekaran @ Segaran s/o Kandan (deceased) to the applicant on the ground that she was the lawful widow and relict and the sole next of kin of the deceased. The applicant claimed that she had married the deceased, a Hindu, in 1942 at a Hindu wedding and in the presence of witnesses. The deceased had on 7 April 1948, by a written agreement, borrowed money from the respondent. It was agreed, *inter alia*, that the deed to the disputed property was to be deposited with the respondent as collateral security for the repayment of the loan. On 11 August, 1969, the respondent, as creditor of the estate of the deceased, applied for and obtained a grant for the Letters of Administration to the estate of the deceased, without citing the applicant as a party. By way of affidavit, the applicant asserted, without challenge, that she did not take out the aforesaid Letters of Administration because of insufficient funds. Further, it was alleged that the respondent as the Administrator/Trustee of the estate of the deceased had utterly failed to carry out his duties diligently to safeguard the estate of the deceased. The respondent, on the other hand, affirmed that he did not know whether the applicant was in fact the widow of the deceased nor did he know that she did not have funds to take out Letters of Administration of the estate of the deceased. Further, the respondent challenged the applicant's claim that she was the wife of the deceased. The disputed questions of fact, particularly with regard to the status of the applicant as to whether she was the lawful wife could only be resolved by the application being adjourned into open court and leave given to the parties to cross-examine the deponents.

Held:

[1] Having seen the applicant's witnesses testify and having noted their demeanour, particularly under cross-examination, the applicant did marry the deceased at the time and in the manner claimed by the applicant.

[2] At the material time, in the case of a Hindu customary marriage, registration of the marriage was not an essential requirement for its validity.

[3] The respondent was in no position to adduce affirmative evidence in support of his bare allegation that the applicant was not the lawful widow and relict of the deceased.

[4] Even without the testimony of the applicant's witnesses, the testimony of the applicant herself would have been acceptable.

[5] In any event, no religious ceremony or indeed any ceremony was essential for a valid marriage between the applicant and the deceased they being of different religions and customs and domiciled in Penang at all material times.

[6] The only requirement of the Common Law, which was applicable to the question whether the applicant was the legal wife of the deceased was the basic essence of marriage, namely, an agreement between the parties.

[7] In the circumstances, the applicant is entitled to a declaration that she is the lawful widow and relict and sole next of kin of the deceased and so is entitled to succeed to the whole estate of the deceased. The disputed property must be retransferred into the name of the applicant.

[8] Any claims the respondent may have against the estate of the deceased would have to be litigated according to law.

[Application allowed with no order as to costs].

Cases referred to:

Yeap Cheah Neo v. Ong Cheng Neo [1875] LR 6 PC 381 ***(refd)***

Carolis de Silva v. Tim Kim [1905] 9 SSLR 8 ***(refd)***

Khoo Hooi Loong v. Khoo Hean Kwee [1926] AC 529, 543 ***(refd)***

Chia Teck Leong & Ors. v. Estate and Trust Agencies (1927) Ltd. [1939] MLJ 118 ***(refd)***

Legislation referred to:
Distribution Act 1960
Limitation Act 1953
Moneylenders Act 1951
Small Estates (Distribution) Ordinance 1955, ss. 13, 17
Trustee Ordinance 1949

For the applicant - Goik Ah Kim; M/s. Goik Ah Kim & Co.
For the respondent - Abdul Razak bin Yaacob; M/s. Razak & Co.

JUDGMENT

Edgar Joseph Jr. SCJ:
This was an application by way of originating summons by a certain Madam Goh Liew Kee alias Goh Ah Nya ("the applicant") praying for an order that the respondent C. Moosa bin Haji Abdullah ("the respondent"), as administrator of the estate of K. Sekaran alias Segaran s/o Kandan ("the deceased") do transfer the land comprised in Lot 582, s. 6, Bandar Bukit Mertajam ("the disputed property") which forms part of the estate of the deceased, to her, on the ground that she was, at the material time, the lawful widow and relict and the sole next of kin of the deceased who had died intestate.

According to the applicant, she had married the deceased, a Hindu, in the year 1942 when Malaya was under Japanese military occupation at a Hindu Temple in Bukit Mertajam, a Hindu priest having officiated at the wedding in the presence of witnesses of whom she called two, namely, A. Muniandy (PW1) and P. Letchumanan (PW2) to testify on her behalf.

Thereafter, they lived together in Bukit Mertajam as man and wife but there was no issue of the marriage.

On 5 August, 1950, the deceased died intestate and left certain lands including the disputed property.

It was common ground that on 7 April, 1948, the deceased had borrowed a sum of RM2,500 from the respondent as evidenced by an agreement of loan of that date ("the agreement"). Although it was recited in the agreement that the loan was free of interest (clause 3) it was provided that the deceased would have to deposit with the respondent, as collateral security for the repayment of the loan, the title deed to the disputed property (clause 2) and that the respondent was to be entitled to all income derived therefrom, including income from houses thereon, until such time as the loan was fully repaid (clause 4). It was lastly provided that the agreement would be binding upon the heirs, administrators and assigns of both parties. (clause 4).

On 11 August 1969, the respondent as creditor of the estate of the deceased had applied for and obtained a grant of Letters of Administration to the estate of the deceased pursuant to s. 13 of the Small Estates (Distribution) Ordinance, 1955, though without citing the applicant as a party.

The respondent admitted that although under the agreement he was to be entitled to all income derived from the lands, including houses thereon, in fact it was the applicant who had been receiving that income and that she had refused to hand over the same to him.

The respondent also said that he was prepared to have the disputed property vested in the name of the beneficiary of the estate of the deceased upon the applicant repaying to him the said loan, reimbursing him certain expenses he claimed he had incurred in connection with the disputed property and paying him the rental income derived from the disputed property from 1975 until 1980, amounting in all to RM3,800.

On 13 January, 1988, upon the application of the applicant as the lawful widow of the deceased, the Collector of Land Revenue, Bukit Mertajam, had made an order of direct distribution pursuant to s. 17 of the Small Estates (Distribution) Ordinance, 1955, in her favour in respect of three pieces of land, being, Lots 562, 563 and 564 s. 6, Bandar Bukit Mertajam, State of Penang. (See Ex "BB" to En 9).

The applicant explained that she had not applied for distribution of the disputed property because the respondent had, as early as 1969, been granted Letters of Administration to the estate of the deceased, as unsecured creditor to protect his legal position.

The applicant further explained that she had no knowledge of the proceedings before the Collector at the time when the respondent had applied for, and been granted, Letters of Administration to the estate of the deceased.

The applicant went on to assert, without challenge, that upon the death of the deceased she found herself in acute financial straits and did not have sufficient funds to meet legal expenses for taking out Letters of Administration to the estate of the deceased.

The applicant further asserted, without challenge, that she had on a number of occasions made several attempts to settle the loan aforesaid but the respondent had ignored those attempts. The applicant said that she was prepared to pay into Court the sum of RM2,500 in repayment of the loan.

Touching on the conduct of the respondent as administrator of the estate of the deceased, the applicant alleged that the respondent as administrator/trustee of the estate of the deceased had utterly failed to carry out his duties diligently to safeguard the interest of the estate of the deceased, in that he had:

(a) failed to administer the estate to the best of his ability and not to cause waste to the estate;

(b) failed to use due diligence and prudence to consult the beneficiary concerned as to the proper course of action to be taken as regards the estate in the best interests of the beneficiaries;

(c) failed in his duty by not finding out who the existing beneficiary or beneficiaries were or wilfully failed to cause an advertisement to appear in the national papers as required under the provisions of the Trustee Ordinance 1949, to ascertain the status of existing beneficiaries;

(d) failed to make full disclosure to the Court that the applicant was the lawful wife and sole beneficiary of the deceased's estate during hearing of civil suit no. 600 of 1983 at the Magistrate's Court, Bukit Mertajam, being an action for possession brought by the respondent against a licensee who was in possession of Lot 582 with the consent of the applicant;

(e) acted in breach of his fiduciary duty by failing to render proper accounts or to distribute dividends to the applicant from the date of grant of administration to the date of this suit;

(f) failed to take into consideration the welfare and interests of the estate, by exhausting the estate in unnecessary court battles and even an appeal to High Court being civil appeal No. 11-27-87 which appeal arose out of the decision in Magistrate's Court, Bukit Mertajam civil suit 600/83 and is still pending before this Honourable Court;

(g) attempted to pervert the course of justice by misrepresenting to the Court in his affidavit-in-reply dated 28 March 1988 that he had no knowledge of the true status of the applicant despite the fact that the respondent was fully aware of the grant of the Collector's order of distribution dated 13 January 1988, to the applicant as the lawful widow of the deceased;

(h) failed to protect the interest of the estate by committing the estate to unnecessary litigation, to wit, suit No. 600 of 1983, Magistrate's Court, Bukit Mertajam;

(i) wilfully attempted to undermine and exhaust the estate by committing the estate to unauthorised expenditures amounting to RM19,320 particulars whereof appear in paragraph 5 of the respondent's affidavit in reply dated 2 March 1989.

And, touching on the loan agreement, the applicant had by affidavit contended that it was null and void and unenforceable against the estate upon the following grounds:

(a) as against the estate the respondent's claim of RM2,500 qua-lender, thereof, is barred by the Limitation Act 1953;

(b) as administrator/creditor of the estate, the loan agreement (hereinafter called 'the 1948 agreement') when read as a whole was a sham because in actual fact, it was a money-lending transaction and therefore illegal, void and unenforceable for non-compliance with the provisions of the Moneylenders Act, 1951;

(c) under paragraph 3 of the 1948 agreement which is filed herein as exhibit 'BB' hereto, the loan was described as being '**free of interest**' and yet in paragraph 4 thereof, the respondent claimed to be entitled to 'all incomes from the said piece of land and ...' and therefore from these recitals, the respondent is mounting a covert exercise to circumvent the provisions of the Moneylenders Act thereby rendering the whole loan agreement illegal and against public policy.

In an attempt to support her case, the applicant had also adduced in evidence, an Adoption Certificate No. 1016679 dated l9 June, 1962, according to which the applicant had adopted one Atchuthan s/o Sekharan said to have been born on 11 June, 1944, in Bukit Mertajam. This adoption

was long after the death of the deceased and I do not regard it as of any evidentiary value. I accordingly do not place any reliance upon it. I mention it nevertheless as part of the history of the case and also because Atchuthan had on 3 October 1983 lodged a caveat against the disputed property for reasons which, according to his affidavit affirmed on 23 September 1991, were as follows:

2. At the time when I found out that C. Moosa bin Haji Abdullah was anticipating to sell out the said property I was the only person who had *prima facie*, a caveatable interest in the said property as my name in the Identity Card was written as Atchuthan s/o Sekharan and my Identity Card was the only piece of documentary evidence on my relationship with the deceased Sekharan.

3. At that material time my mother, the said Goh Liew Kee @ Goh Ah Nya could not establish her lawful relationship with the deceased in order to support her application to lodge a caveat to protect her interest.

4. I was desperate as well as determined to protect my mother's interest and the only option opened to me at that moment of time was to state in my statutory declaration that the caveat was intended to protect my interest because I considered and still consider my mother's interest and my interest as being synonymous because I am her only adopted child. In the event of my mother's dying before me, I am the only sole beneficiary to claim her estate wholly.

5. I further affirm that I am neither the natural son nor the adopted child of the deceased Segeran @ Sekharan s/o Kandan although my identity card shows and written as being the son of Sekharan because my mother adopted the name of Atchuthan s/o Sekharan at the time when she applied for my identity card.

6. In view of the foregoing fact, I do not consider that I can have any rightful claim over the deceased's estate except through my mother who is the lawful wife of the deceased.

On the other hand, the case for the respondent as appeared from his affidavit affirmed on 28 March 1988, (En 8) was this: he did not know whether the applicant was in fact the widow of the deceased nor did he know that she was in acute financial straits at the time of the death of the deceased and so did not have the funds to meet the legal expenses to take out Letters of Administration to the estate of the deceased.

Nevertheless, the respondent challenged the applicant's claim that she was the widow of the deceased by contending that she had not substantiated her claim. He further contended that if the applicant were the widow of the deceased she would have attended the hearing before the Collector of Land Revenue, Bukit Mertajam, when the respondent had applied for Letters of Administration to the estate of the deceased as creditor of the estate. This, according to the respondent, indicated that the applicant herself knew that she was not the widow of the deceased and so not entitled to succeed to his estate.

It will be recalled, however, that the applicant had alleged that she was not aware of those proceedings at the material time and that the respondent when applying for Letters of Administration, had in his application for Letters of Administration deliberately misrepresented to the Collector that the deceased had died leaving no next of kin.

But, to continue with the respondent's case, it is convenient to quote his own words as they appear in paras 9 to 11 of his affidavit affirmed on 28 March 1988.

9. The respondent avers that in actual fact the applicant has no claim to the estate. What happened was when the respondent visited the land in 1980 the land was vacant but on my visit in 1981 a building was illegally erected on it and was occupied by second-hand dealer A. Thangamt/a Syarikat A. Thangam and the respondent immediately gave him a notice to quit the land. He refused to move out saying he is renting the land paying rent to the applicant for many years.

10. I told the said Thangam that he only came in 1981, how could he claim to have been paying rentals for many years to her. The occupier came to see me and offered to pay RM40,000 to purchase the land. I refused because the property is still the estate of K. Sekaran @ Segaran s/o Kandan.

11. I then through a Counsel issued a notice to quit to the said Thangam. He replied to notice as in Exhibit '1'. In that reply the said Thangam did not reveal the name of applicant as wife of deceased but stated the name of the son of deceased.

More particularly, the tenant Thangam's reply dated 20 March 1982, to the notice to quit dated 16 March 1982, issued by the respondent's solicitors, was in the following terms:

> Syarikat A. Thangam,
> Membeli dan menjual
> Barang-barang Lama,
> Store 91, Lot No: 582,
> Jalan Kulim,
> Bukit Mertajam,
> P. Wellesley.
>
> Date 20 March 1982.
>
> Syarikat C. V. Prabhakaran,
> Advocates & Solicitors,
> Bilik B-5, Tingkat Kedua,
> Bangunan Malayan Banking,
> Jalan Bagan Luar,
> Butterworth.
>
> Dear Sirs,
>
> I have to acknowledge your notice to quit dated 16 March 1982 in respect of Land at Lot No: 582, Mukim 6, Bukit Mertajam and I have to reply to you as follows:
>
> 1. Sekaran, the registered owner of the Land died in 1949.
> 2. His widow and her son Achunathan has given me permission in 1975 to construct the house on the land at a ground rent payable to her at the rate of dollars Forty (RM40) a month.
> 3. I have been paying the rent regularly to her and acknowledged by her. I have therefore (been) in uninterrupted possession of the land concerned.
> 4. My construction therefore is not illegal.
> 5. Please let me know if your client is the registered owner of the land entitled to the possession thereof as demanded by you.
>
> Yours faithfully,
> Sgd.
> A. Thangam

The respondent also denied that the applicant had ever approached him and offered to repay the loan.

Having regard to the facts outlined above, which were garnered from the various affidavits filed, I considered that there were disputed questions of fact, particularly with regard to the status of the applicant, in particular, whether she was the lawful wife of the deceased at the time of his death, which could only be resolved by the application being adjourned into open Court and leave being given to the parties to cross-examine the deponents upon their affidavits, a course with which Counsel on both sides readily agreed.

The very first question I have to determine is the question of the status of the applicant in relation to the deceased; this, as I have just said, was whether at the time of his death the applicant was the only lawful widow and relict of the deceased.

I have already noted that the case for the applicant was that although there was no contemporary documentary evidence substantiating the fact of marriage as, for example, a marriage certificate or of any other documentary evidence indicating that the alleged marriage had been registered, it was said that there had been a marriage ceremony performed by a priest in a Hindu Temple at Bukit Mertajam, in the presence of witnesses who included A. Muniandy and P. Letchumanan. The priest however was not called as a witness because it was said he was untraceable which, of course, was not surprising since the alleged ceremony took place some fifty years ago at the onset of the Japanese Military Occupation of Malaya in 1942.

The whole of the material evidence on the issue of marriage was carefully and critically examined before me and it is unnecessary to discuss it again. Suffice it to say that the two witnesses who claimed that they had witnessed the marriage ceremony were cross-examined at length but emerged unscathed. Their recollection was far from perfect, which is perhaps understandable, considering that they were testifying as to events which had occurred some four decades ago and considering their station in life.

I am satisfied having seen them testify and after having noted their demeanour, particularly under cross-examination, that their version of the events on the day when they say the ceremony of marriage took place was substantially accurate. I am satisfied that the applicant did go through a ceremony of marriage with the deceased according to Hindu rites in the Hindu Temple at Bukit Mertajam and that a Hindu priest had officiated at that ceremony. On this point, I believe the testimony of the applicant and the two witnesses called on her behalf. Had there been documentary evidence to substantiate the fact of marriage this would, of course, have gone a long way to assist the applicant's claim that she was the lawful widow and relict of the deceased but I do not consider that the absence of such evidence, especially bearing in mind that the marriage ceremony took place during the somewhat chaotic conditions

which prevailed in the country at the onset of the Japanese Occupation, was fatal to her case. In any event, at the material time, in the case of a Hindu customary marriage in this country, registration of the marriage was not an essential requirement for its validity.

I also accept the applicant's testimony that after her marriage to the deceased she and the deceased lived together as man and wife and that they were known as such by their friends in the neighbourhood where they lived.

I need hardly add that the respondent was only able to subject the applicant's case on the issue of marriage to a critical analysis and nothing more since he had no knowledge as to whether in fact the applicant was the lawful widow of the deceased. In other words, the respondent was in no position to adduce affirmative evidence in support of his bare allegation that the applicant was not the lawful widow and relict of the deceased.

As for the respondent's attack on the case for the applicant on the issue of marriage, I am satisfied that it failed, having regard to my acceptance of the testimony of the applicant and her two witnesses. I would go further and say that even without the testimony of the two witnesses I would still accept the testimony of the applicant because I found nothing improbable in her testimony and also because of the impression she made upon me while she testified in the witness box. She also stood up well to cross-examination.

In any event, I am of the view that no religious ceremony or indeed any ceremony was essential for a valid marriage between the applicant and the deceased they being of different religions and customs and domiciled in Penang at all material times. The only requirement of the Common Law which I hold applied to the question whether the applicant was the legal wife of the deceased was the basic essence of marriage, namely, an agreement between the parties. I need only refer to a few cases in support.

In 1875, the Privy Council reviewed the history of the Straits Settlements in the case of *Yeap Cheah Neo v. Ong Cheng Neo* [1875] L.R. 6 P.C. 381 and held that the Common Law of England must, having regard to the Royal Charters of 1807, 1826, and 1855, be taken to be the Law of Penang so far as it was applicable to the circumstances of the place, modified in its application by these circumstances.

In *Carolis de Silva v. Tim Kim* [1905] 9 SSLR 8 it was held that a Chinese woman and a Singhalese could by mere *verba praesenti* contract a legal marriage. This case shows that mixed marriages between domiciled inhabitants of different religions or races can be validly contracted. Then, in *Khoo Hooi Loong v. Khoo Hean Kwee* [1926] AC 529, 543 the Court enunciated the principle which finally abandoned the necessity for a ceremony at all, and recognised the possibility that a Christian Eurasian could contract a legal polygamous marriage with a Chinese.

In *Chia Teck Leong & Ors. v. Estate and Trust Agencies* [1927] Ltd. [1939] MLJ 118 the Court held that a professing Christian woman could contract a legal secondary marriage with a Chinese.

I therefore reiterate that the Common Law of England as to marriage as introduced into Penang was applicable to the marriage of the applicant and the deceased though modified to suit the conditions applicable in a case such as this, where the parties were of different races and different religious persuasions and that the requirements of the Common Law in such cases would be satisfied by a marriage *per verba praesento*. Upon the evidence before me, I am satisfied that those requirements were satisfied. In this context, I would refer to the ceremony - even though it might not have been proved to have been in accordance with Hindu custom - the presence of Hindu friends of the deceased, the co-habitation as man and wife which followed and continued till the death of the deceased, and the fact that the deceased and the applicant, were known in the neighbourhood where they lived to be man and wife, point to the conclusion that the parties intended to contract a Common Law marriage.

In these circumstances, the applicant as the lawful widow and relict and sole next of kin of the deceased is entitled to succeed to the whole estate of the deceased in accordance with the provisions of the Distribution Act 1960, he having died intestate and I so declare.

I must now consider the appropriate remedies to which the applicant is entitled.

(After Hearing Submissions)

By her application the applicant has prayed for the following relief:

> That the respondent, as creditor/administrator of the estate of K. S. Sekeran @ Segeran s/o Kandan deceased, do transfer all that

Lot 582, s. 6 Bandar Bukit Mertajam, (the disputed property) forming part of the estate of the deceased abovenamed to the applicant, the widow and sole relict of the said deceased, on payment of the sum of RM2,500 to the respondent as creditor of the said deceased and for such orders and reliefs as the Court may deem fit and expedient.

Having regard to my finding that the applicant is the lawful widow and relict of the deceased, and upon the evidence before me, she being the sole next of kin of the deceased, the applicant is entitled to succeed to the whole of the estate of the deceased by virtue of the Distribution Act 1960, and therefore she is solely entitled to the ownership of the disputed property, and I so declare. The respondent must therefore sign a memorandum of transfer in due form transferring the disputed property to the applicant as soon as possible and, in any case, not later than two weeks from date hereof, failing which the Senior Assistant Registrar of this Court be and is hereby authorised to do so on behalf of the respondent and/or on behalf of the estate of the deceased. I further order that upon presentation of the duly executed memorandum of transfer accompanied by the issue document of title to the disputed property, the proper registering authority be and is hereby required to forthwith register the same in the name of the applicant. The respondent must, of course, also forthwith surrender all old title deeds relating to the disputed property to the applicant to enable her to apply for an Advanced Certificate of Title.

I give liberty to the applicant, but only after the transfer of the disputed property has been registered in her favour, to apply for the grant of Letters of Administration to the estate of the deceased, whereupon the grant of Letters of Administration in favour of the respondent must be revoked, and the same granted to her, instead, she being the lawful widow and relict of the deceased.

I would have gone on to say that any claims the respondent may have against the estate of the deceased would have to be litigated according to law but I am now informed that the parties have arrived at a compromise regarding this.

By consent, parties to bear their own costs.

JAMES CAPEL (FAR EAST) LTD.

v.

Y K FUNG SECURITIES SDN. BHD. AND TAN KOON SWAN (THIRD PARTY)

HIGH COURT, IPOH
DATO' PEH SWEE CHIN SCJ
[KOD 23-202-86]
27 AUGUST 1992

PRACTICE AND PROCEDURE: Application for leave to amend pleadings - Application made by defendant in the middle of the trial after the plaintiff had closed its case - Whether amendment necessary - Principles applicable.

The plaintiff sued the defendant, a company of share-brokers in Ipoh for the balance of the price of shares and stocks sold to the defendant and for damages, interests and costs. The defendant pleaded illegality of the contracts for the sale and purchase of shares.

The defendant made an application for amendment of its pleadings, its fourth application for amendment, in the course of the trial and after the plaintiff had closed its case. The purpose of the proposed amendment was to plead s. 34 of Singapore's Securities Act 1973 which provided for recission of the contract within seven days of receipt of the contract note.

The contract notes were all issued on various dates in 1985 and the defendant purported to rescind the same by notice of recission dated 7 June 1991.

Held:

[1] The notices of recission were issued after the expiry of the seven days as provided pursuant to s. 34(3) Singapore's Securities Industry Act 1973 and were given completely out of time.

[2] The application at that stage of the proceedings was grossly unfair to the plaintiff whose witnesses were all overseas to have them recalled when the amendment would have been apparent years ago if it was found tenable.

[Application dismissed with costs].

Cases referred to:

Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1983] 1 CLJ 191/[1983] 1 MLJ 213 (***refd***)

Jeyaratnam Joshua Benjamin v. Lee Kuan Yew [1990] 2 MLJ 65 (***foll***)